

APPEAL NO. 041347
FILED JULY 21, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 12, 2004. The hearing officer determined that the appellant's (claimant) _____, compensable injury does not extend to include herniations at L4-5 and L5-S1, short and long-term memory dysfunction, attention deficit disorder, and/or depression. The claimant appealed on sufficiency of the evidence grounds. The respondent (carrier) responded objecting to a document attached to the claimant's appeal, and otherwise urging affirmance.

DECISION

Affirmed as reformed in part and reversed and rendered in part.

The parties stipulated that venue was proper in (City 1) Field Office of the Texas Workers' Compensation Commission, and it appears from the record that was where the CCH on this matter was held. Conclusion of Law No. 2 erroneously states that venue was proper in (City 2) Field Office. We reform Conclusion of Law No. 2 to reflect that venue was proper in (City 1) Field office in compliance with the stipulation of the parties.

The claimant attached a document to his appeal which was not admitted at the hearing. Documents submitted for the first time on appeal are generally not considered unless they constitute admissible, newly discovered evidence. The claimant did not explain why he was unable to obtain this document at an earlier time. We conclude that this attachment to the claimant's appeal does not meet the requirements of newly discovered evidence necessary to warrant a remand. Having reviewed the document, we conclude that its admission on remand would not have resulted in a different decision. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The hearing officer did not err in determining that the _____, compensable injury does not extend to include herniations at L4-5 and L5-S1. The hearing officer was not persuaded by the claimant's evidence regarding causation, and concluded that the evidence amounted to no more than speculation. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness.

Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The hearing officer erred in determining that the claimant's _____, compensable injury does not extend to include short and long-term memory dysfunction, attention deficit disorder, and/or depression. It is undisputed that the claimant sustained the injuries which make the basis of this claim when he fell 20 feet onto concrete, landing on his head. Voluminous medical records were offered into evidence. We note that with the possible exception of the period of time the claimant was confined by the Texas Department of Criminal Justice from February 24, 2001, until June 16, 2003, the claimant's records are replete with diagnoses of and treatment for residuals from his traumatic brain injury. All of the medical records relate the claimant's cognitive deficits to the traumatic brain injury sustained on _____. In finding against the claimant, the hearing officer stated that:

The evidence also raised the question of whether the [c]laimant has attention deficit disorder and short and long-term memory loss as a consequence of his injury or whether these conditions reflect his actual preinjury mental state. The medical evidence did not effectively address more than just the diagnoses and did not speak to preexisting mental status as it related to these diagnoses.

Not only do we find that the hearing officer's determination regarding short and long-term memory dysfunction, attention deficit disorder, and/or depression is against the great weight and preponderance of the evidence, it appears that the hearing officer applied the wrong legal standard. The carrier did not raise a defense of "sole cause" regarding the claimant's mental condition. No evidence was presented that the claimant had any prior mental dysfunction. No medical evidence was presented to contradict the numerous medical opinions that the claimant sustained a traumatic brain injury and has had residuals as a direct result of it.

The hearing officer's decision and order that the _____, compensable injury does not extend to include herniations at L4-5 and L5-S1 is affirmed. The hearing officer's decision and order that the _____, compensable injury does not extend to include short and long-term memory dysfunction, attention deficit disorder, and/ or depression is reversed and a new decision is rendered that the claimant's _____, compensable injury does extend to include short and long-term memory dysfunction, attention deficit disorder, and/or depression.

The true corporate name of the insurance carrier is **EMPLOYERS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**DONNIE M. WIESE
2505 NORTH PLANO ROAD, SUITE 2000
RICHARDSON, TEXAS 75082.**

Daniel R. Barry
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Veronica L. Ruberto
Appeals Judge